

Internal Revenue Service
memorandum

CC:TL-N-1907-89

Br2:RLOsborne

date: DEC 20 1988

to: District Counsel, Houston SW:HOU

Attn: Carol Bingham McClure

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: Proper Agent for Execution of Forms 870 -- [REDACTED]
[REDACTED]

We hereby respond to your October 13, 1988 request for advice.

ISSUES

1. Who should sign Forms 870 for the group of which [REDACTED] was the common parent for taxable year [REDACTED] and the taxable year ending on or about [REDACTED].

2. Who should sign Forms 870 for the group of which [REDACTED] was the common parent for the short taxable year consisting of the final months of [REDACTED] and taxable years [REDACTED] through [REDACTED]?

FACTS

Prior to [REDACTED], [REDACTED] ("original [REDACTED]," EIN [REDACTED]) was the common parent of a group filing consolidated tax returns. One of [REDACTED]'s wholly-owned subsidiaries was [REDACTED] ("original [REDACTED]," [REDACTED]).

See the attached diagram for help in understanding the following transactions. On [REDACTED], original [REDACTED] formed a new subsidiary, [REDACTED], (" [REDACTED]"), to act as a holding company. [REDACTED] formed a transitional subsidiary, [REDACTED] ("original [REDACTED]"). Original [REDACTED] merged with original [REDACTED]. In the merger, original [REDACTED] went out of existence. Original [REDACTED] ([REDACTED]) survived as a new subsidiary of [REDACTED] and changed its name to [REDACTED]. Original [REDACTED] shareholders received stock in [REDACTED]. Thus, [REDACTED] ([REDACTED]) owned [REDACTED] ([REDACTED]), which in turn owned original [REDACTED] ([REDACTED]). [REDACTED] then distributed its stock in original [REDACTED] to [REDACTED]. Accordingly, [REDACTED] ([REDACTED])

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owned both () and original ().

On , insiders (primarily management and employees) of formed another new holding company, (). formed a subsidiary, (). merged into and went out of existence. survived as a new subsidiary of . The shareholders were bought out with cash.

On or about , split its construction and engineering businesses into two corporate groups to be held separately by the shareholders. formed a new subsidiary, (). transferred its stock in and other construction-oriented subsidiaries to , but retained its stock in and other engineering-oriented subsidiaries. then merged into . survived under a new name, (). As a result of the merger, the former shareholders surrendered their stock and received (1) stock in and (2) stock in . () thus became the common parent for a new group which included original (), and () thus became the common parent for a new group which included ().

Exams has audited the group of which original () was the common parent, for the group's taxable year and the group's taxable year ending on or about . Exams has also audited the group of which () was the common parent, for the group's short taxable year ending , and the group's taxable years , and . You have asked us how consents to assessment on form 870 should be executed.

DISCUSSION

Treas. Reg. § 1.1502-77(a) provides that a group's common parent shall be the group's sole agent for waiver purposes with respect to the group's consolidated return year. Accordingly, if a waiver relating to a given year is needed subsequently, after a restructuring, as a general rule the entity which was previously the common parent continues to act as agent for the signing of the waiver. This is the case even if the former common parent is no longer the common parent at the time it signs the waiver.

The general rule set forth above does not apply, however, where the restructuring results in the termination of the existence of the common parent. In that event, Reg. § 1.1502-

77(d) provides that the new agent for the group will be either (1) a member designated by the old common parent prior to the termination of its existence, or (2) a member designated by the remaining members of the group if the old common parent failed to make a designation. That regulation further provides that if neither the old common parent nor the remaining members designate a new agent, the district director must deal with the members on an individual basis.

Finally, Southern Pacific Co. v. Comm'r, 84 T.C. 375 (1985), provides another rule for reverse acquisitions under Reg. § 1.1502-75(d)(3)(i). That regulation applies where one corporation acquires a second corporation, and the acquired corporation's shareholders receive stock in the acquiring corporation, so that the acquired corporation's shareholders have more than 50% of the value of the stock of the acquiring corporation immediately after the acquisition. The regulation provides that the acquired corporation's affiliated group is deemed to continue in existence, with the acquiring corporation as the new common parent. Southern Pacific involved a reverse acquisition in which the old common parent went out of existence as a corporation. The Tax Court held that under the circumstances the new common parent automatically became the common parent for pre-reorganization years as well as for future years. Tax Litigation Division interprets this rule to apply to reverse acquisitions only where the old common parent goes out of existence as a corporation.

Reg. 1.1502-77(d), requiring either the designation of new agents or the securing of separate consents from each group member, applies only if the old common parent goes out of existence. In the three restructurings since [REDACTED], Original [REDACTED] has ceased to be common parent of new groups, and has changed its name, but it has never gone out of existence. In the [REDACTED] merger it became a subsidiary of [REDACTED] and changed its name to [REDACTED]. In the [REDACTED] restructuring, whereby [REDACTED] became the new common parent of the group, [REDACTED] continued as one of the group members. In the [REDACTED] restructuring, in which the construction and engineering business were split into two corporate groups, [REDACTED] continued as a subsidiary of [REDACTED]. Since original [REDACTED], now called [REDACTED], has continued in existence, it continues to be the proper party to sign consents for [REDACTED] and [REDACTED] for the old group of which original [REDACTED] was common parent. The consent should be signed by an officer of [REDACTED] ([REDACTED]), agent.

The [REDACTED] merger has the general appearance somewhat like that of a reverse acquisition. Because [REDACTED] was previously owned by original [REDACTED], it would more likely be treated as a "downstream merger," a related concept under Reg. 1.1502-75(d)(2). Rev. Rul. 82-152, 1982-2 C.B. 205. Tax

Litigation Division's position would be that the Southern Pacific rule is inapplicable because original [REDACTED], the old common parent, did not go out of existence in the transaction. However, that position carries a litigation risk, since the Southern Pacific court did not explicitly limit its ruling to cases where the old common parent terminates its existence. Accordingly, as a safety measure, in compliance with the Southern Pacific rule, you may wish also to obtain a consent executed by the new common parent after the merger, [REDACTED], under its present name, [REDACTED] ([REDACTED]), in connection with those two initial years.

Following the [REDACTED] merger, [REDACTED] ([REDACTED]) was the common parent of the group. The [REDACTED] merger of [REDACTED] into [REDACTED], whereby [REDACTED] became the new common parent, would probably be treated as an acquisition of [REDACTED] stock by [REDACTED]. Rev. Rul. 79-273, 1979-2 C.B. 125; Rev. Rul. 73-427, 1973-2 C.B. 301. The [REDACTED] shareholders as a group did not receive [REDACTED] stock, but rather cash. Accordingly, this was not a reverse acquisition within the meaning of Reg. 1.1502-75(d)(3)(i). Moreover, [REDACTED] did not go out of existence in the transaction. Accordingly, the rule of Southern Pacific is inapplicable.

As in the case of original [REDACTED], [REDACTED] has been through restructurings and has changed its name, but it has never gone out of existence. In the [REDACTED] restructuring, it ceased to be the common parent of the group created by that restructuring, but survived as a subsidiary of [REDACTED]. In [REDACTED], it survived again, under the name [REDACTED], as the common parent of a new group. Since [REDACTED], now called [REDACTED], has continued to exist, it continues to be the proper party to sign consents for the short year ending [REDACTED], and the years [REDACTED] through [REDACTED] for the old group of which it was the common parent. Any consent should be signed by an officer of [REDACTED] ([REDACTED]), agent.

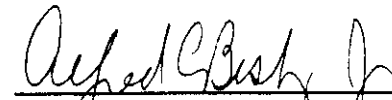
CONCLUSION

For the [REDACTED] and [REDACTED] years of the group of which original [REDACTED] was the common parent, [REDACTED] ([REDACTED]) is the proper party to execute Forms 870. As a safety measure, however, you may also wish to obtain a consent from [REDACTED] ([REDACTED]). For the last few months of [REDACTED], and the [REDACTED], [REDACTED] and [REDACTED] years of the group of

which [REDACTED] was the common parent, [REDACTED]
[REDACTED] ([REDACTED]) is the proper party to execute Forms 870.

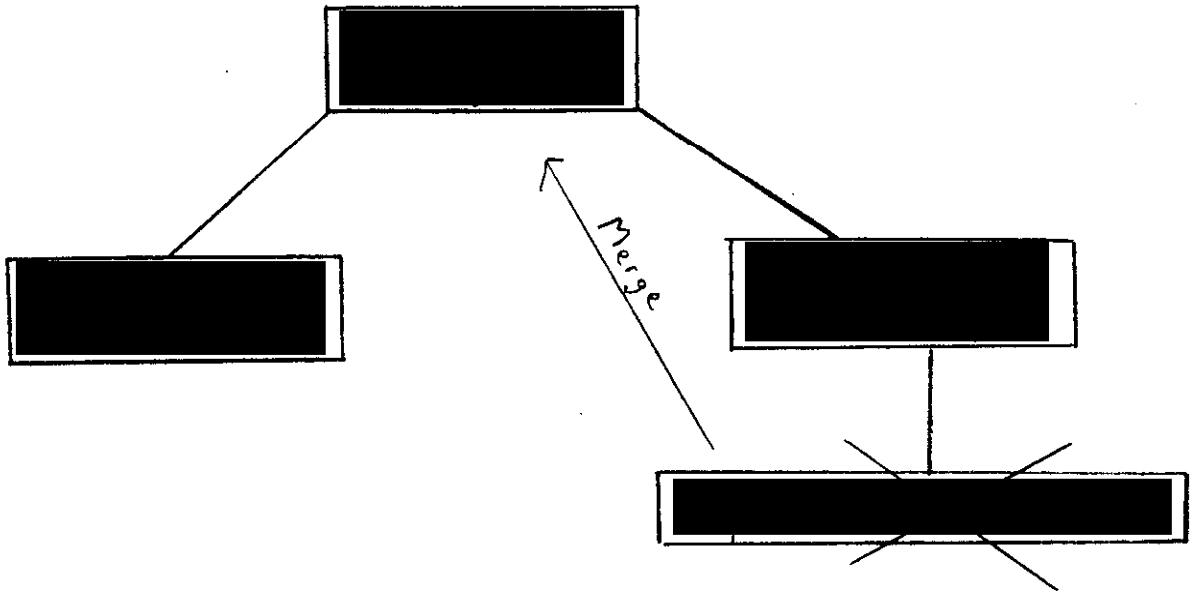
MARLENE GROSS

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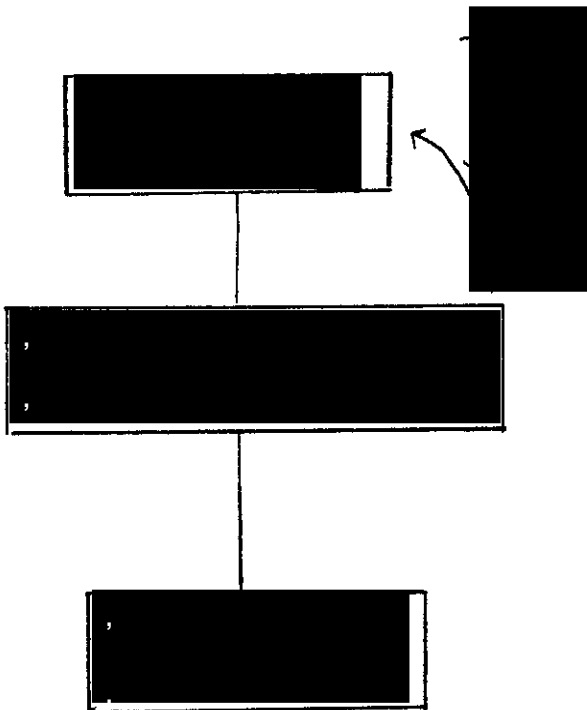

ALFRED C. BISHOP, JR.
Chief, Branch No. 2
Tax Litigation Division



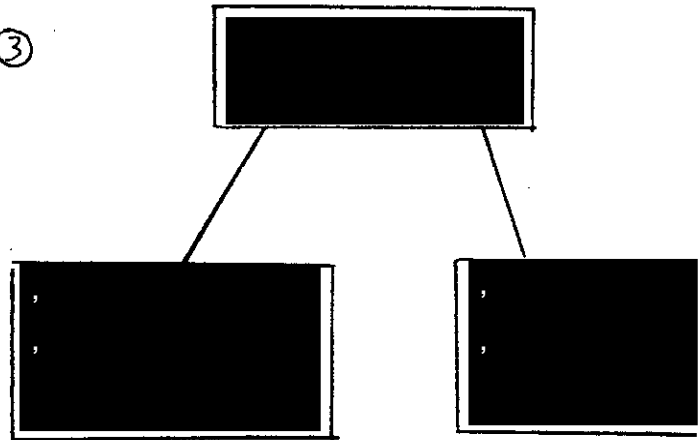
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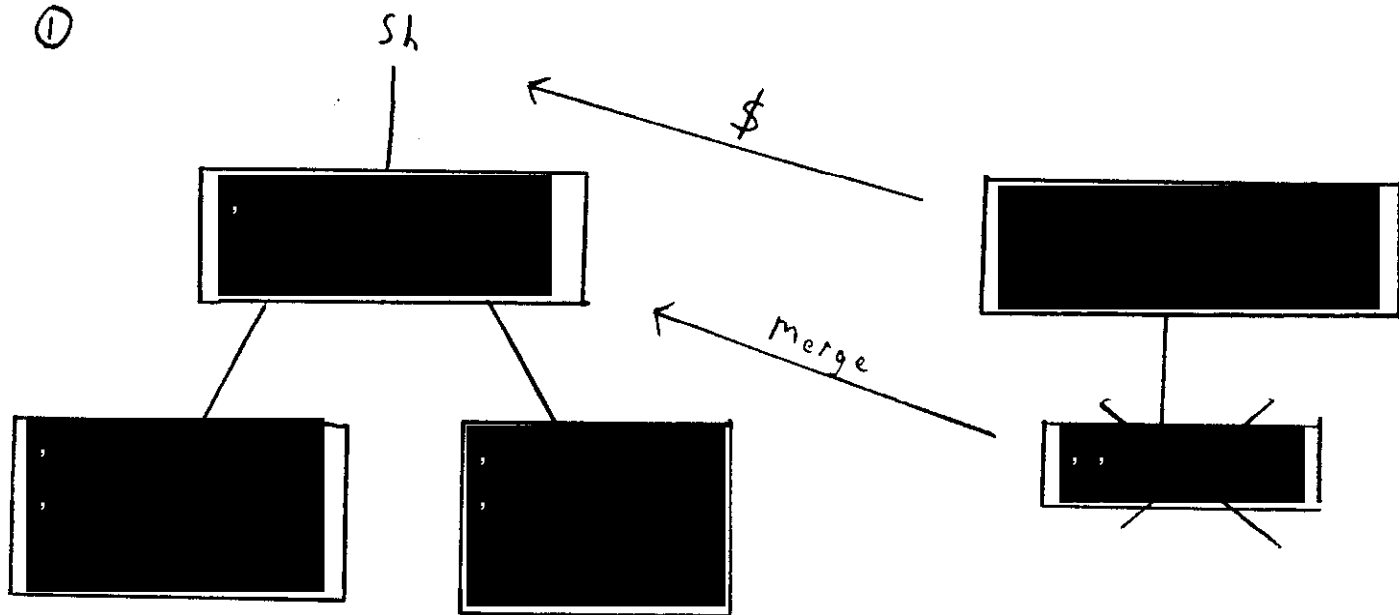


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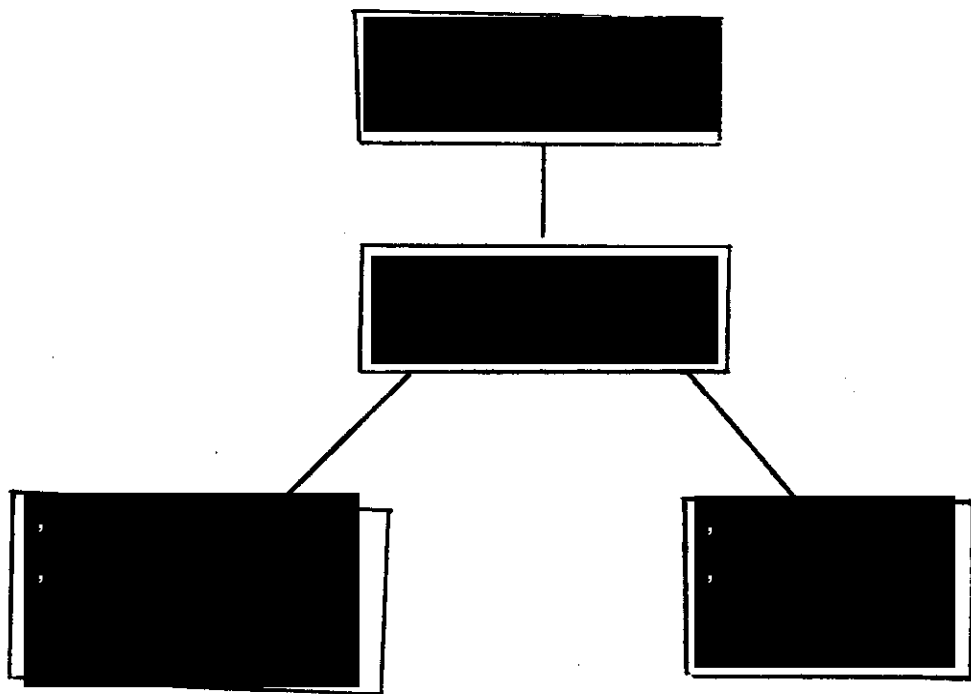
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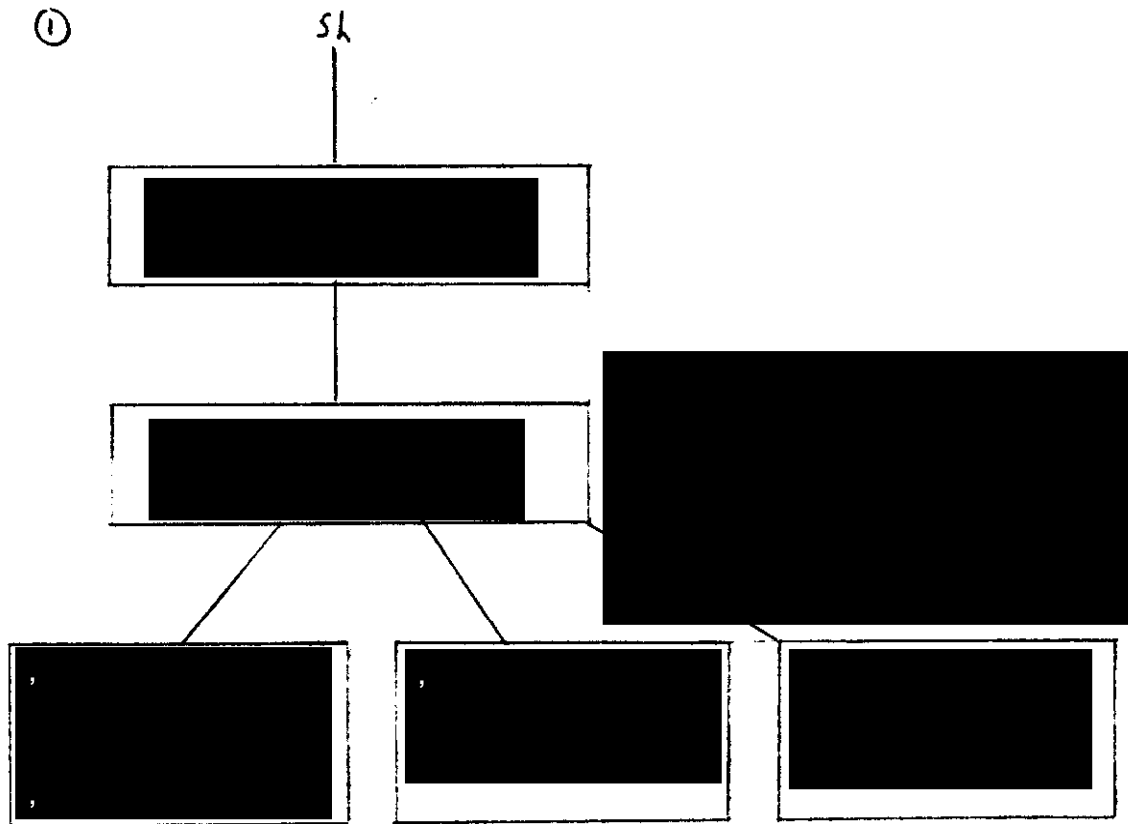


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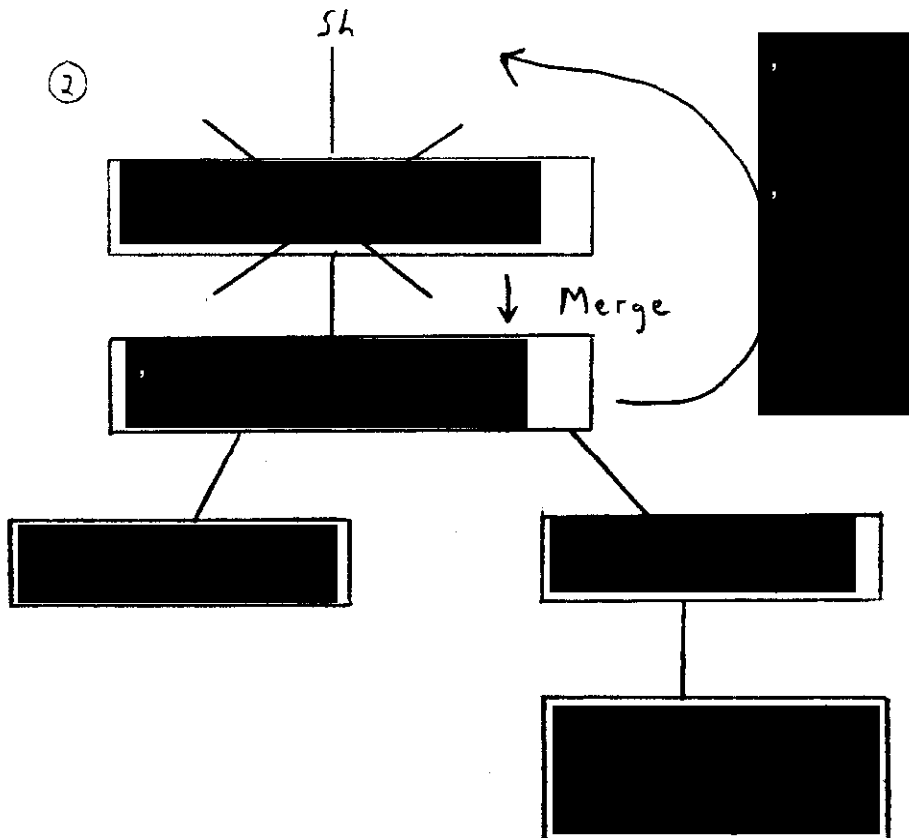
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